Has the U.S. Supreme Court Effectively Overruled Roe v. Wade?

Mark Tushnet

03.09.2021

Late in the evening of September 1 the U.S. Supreme Court issued an order that many critics have described as effectively overruling *Roe v. Wade*, the 1973 decision holding that the U.S. Constitution protected a woman's right to choose to have an abortion. That description, though technically inaccurate, does capture something important about the Court's order: It made abortions unavailable as a practical matter for many women in Texas who would have had access to abortion services had the Court issued a different order.

Undue burden

First, what is the relevant law? Texas adopted a statute known as SB8 prohibiting abortions after a fetal heartbeat can be detected, which is roughly at six weeks after conception. Under existing constitutional doctrine, SB8 is almost certainly unconstitutional. (a) The rule stated by *Roe v. Wade* is that prohibiting abortion until some much later time – sixteen to twenty weeks after conception – is unconstitutional. (b) That rule was modified in 1993 in the *Casey* decision to make unconstitutional laws that impose "undue burdens" on a woman's right to choose. (The *Casey* decision did say that it preserved the "core holding" of *Roe v. Wade*, which it described as a rule barring complete prohibitions on early-term abortions.) Because a large number of women don't know that they are pregnant at the six-week mark because, for example, their menstrual periods are irregular, or are unable to bring themselves to make a decision to have an abortion in the relatively short period between their becoming aware, usually after four weeks, that they might be pregnant and the time when a fetal heartbeat can be detected, SB8 almost certainly imposes an undue burden on the right to choose.

The applicable constitutional law, though, isn't as clear as that – not because we don't know what *Roe* and *Casey* imply for SB8, but because the Supreme Court's present majority has indicated rather strongly their disagreement with *Roe* and, somewhat less so, with *Casey*. And the Court will hear argument in the next months in a case where the state of Mississippi has expressly asked it to overrule *Roe* and its progeny, including *Casey*. Most observers believe, with good reason, that somewhere between three and six justices will accept that invitation. The consequence is, as law professor Michael Dorf has put it, that no responsible lawyer could advise an abortion provider in Texas that it can continue to offer abortions to women after six weeks, confident that SB8 would be held unconstitutional.

That matters because of the second important feature of SB8. Ordinarily a ban on abortions would be enforced by state officials, usually prosecutors who file criminal charges against violators. SB8 doesn't do that. Instead it authorizes any citizen to file a civil complaint against an abortion provider who violates SB8, which if successful will result in a $10,000 fine and other penalties against the (civil) defendant.

Ex parte Young

The U.S. Supreme Court order involved a challenge to the substantive provisions of SB8, but dealt solely with the implications of this enforcement mechanism. In many European constitutional systems the route to challenging a bill like SB8 would be simple: Legislators would file an ex ante or "abstract review" challenge to the bill in the constitutional court. The U.S. system is different because it requires a "case or controversy" – essentially, what in other nations is called something like a "constitutional complaint" arising in ordinary

litigation – as the vehicle for a challenge. One major form of this is that a defendant charged with violating a criminal statute can raise the statute's unconstitutionality as a defense in the criminal proceeding.

The procedural rules for constitutional challenges in the United States do allow for something quite similar to an ex ante challenge that works in many cases. Here the details matter. The mechanism for such challenges, known as an *Ex parte Young* lawsuit, is this: A potential defendant in a criminal or civil action brought by a state official seeks an injunction in federal court against enforcing the statute on the ground that it is unconstitutional (or seeks a declaration that the statute is unconstitutional). The requisite "case or controversy" arises because, the defendant alleges, it will suffer "irreparable harm" from the mere existence of the statute, harm that can't be eliminated by waiting for the prosecutor to bring criminal charges and asserting the statute's unconstitutionality as a defense. The reason is that the threat of criminal liability – and in particular the size of the threatened penalties – is so large that no potential defendant would take the risk of violating the statute, anticipating that the constitutional challenge will provide it with a successful defense. (Note here the relevance of Professor Dorf's point about what a responsible lawyer would advise an abortion provider client.) The target of the regulation stops doing what it wants to do and no criminal action is actually ever brought.

There's a final wrinkle. The Court has held that a potential defendant can't bring an *Ex parte Young* lawsuit when the prosecutor either (a) expressly disclaims any intent to enforce the statute or (b) expressly asserts that it will bring a single enforcement action in which the statute's constitutionality can be determined (and will not prosecute "violations" that occur between the time this single lawsuit is filed and a final court decision upholding the statute's constitutionality). But, the Court has also held, in the absence of such a disclaimer the courts should assume that the prosecutor will enforce the statute.

With all that as background, here's what happened leading up to the Supreme Court's order. Texas abortion providers filed an *Ex parte Young* action against a number of state judges, court officials, and one anti-abortion activist, asking for injunctive and declarator relief. The judges were to be enjoined from moving forward with any civil actions that were filed under SB8, the court officials were to be enjoined from accepting papers purporting to institute such civil actions, and the activist was to be enjoined from bringing a civil action. The activist-defendant, though, filed papers asserting that he had no intention of filing any such action – the equivalent of the prosecutor's disclaimer already mentioned.

The federal trial judge who had the case held an extensive hearing and ultimately decided that the abortion providers' case could move forward, effectively preventing SB8 from going into effect. The various defendants sought and received a stay of that decision from the intermediate appellate court, putting the litigation on hold and potentially allowing SB8 to take effect in the interim. The abortion providers in turn asked the U.S. for one of two remedies: an injunction against enforcement of SB8 until the underlying litigation was finally concluded, or an order vacating the intermediate court's stay, with the effect of reinstating the trial court's decision that blocked SB8's enforcement.

The U.S. Supreme Court, by a five-to-four vote, refused to provide either form of relief. While noting that the constitutional challenge to SB8 was a serious (potentially valid) one, the Court's order observed that the procedural complexities of the case – whether *Ex parte Young* cases could be brought against these defendants – meant that the abortion providers could not show that they were likely to succeed in the underlying litigation — not, again, because they were wrong about SB8's constitutionality but because the courts might ultimately decide that they hadn't used the right mechanism to bring the challenge.

Rattling around in the discussion of SB8 is a misleading concern about whether the private civil action would be "state action" subject to the relevant provisions of the U.S. Constitution. The answer to that is clear: If the state law authorizing the civil action is substantively unconstitutional – violates *Roe v. Wade* or imposes an undue burden – then a civil action to

enforce the law triggers the Constitution. (That's the only way to understand why civil actions seeking damages for allegedly libelous statements are subject to constitutional requirement.)

Ways forward

Third, what does the Court's action mean? (1) Although the order has no direct implications for *Roe v. Wade* (even as a signal that five justices are ready to overrule *Roe*), it does mean that abortions are now effectively unavailable to a large number of women in Texas because abortion providers have responded, as could have been expected, to the *in terrorem* threat of large fines by declining to provide abortions covered by SB8's prohibition.

(2) Are there other ways to challenge SB8? Of course if some Texas citizen brings a civil action in a Texas state court against an abortion provider that provider can assert SB8's unconstitutionality as a defense. Depending upon Texas's procedural rules the provider might be able to get an expedited hearing on the validity of the defense, and perhaps even some sort of stay of further proceedings against it while this single action is pending. Ordinarily that wouldn't help other abortion providers, but there's a (slim) possibility that the Texas courts would somehow figure out a way to use a single SB8 action as a vehicle for insulating other abortion providers from liability until SB8's constitutionality is finally decided.

And there's yet another wrinkle. Ordinarily federal courts can't enjoin pending state criminal or civil proceedings. But there's a rarely-invoked and quite narrow exception to that rule: A federal court can enjoin a pending state proceeding if the statute authorizing the proceeding is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Perhaps SB8 fits that description (though I wouldn't be confident about that conclusion). If so, once a state civil action under SB8 is filed, the abortion provider can go back to federal court to get an injunction against the civil action.

Finally, perhaps abortion providers can try again with a slightly different *Ex parte Young* action, this one against twenty or thirty anti-abortion activists. The U.S. Supreme Court order noted that "the sole private-citizen respondent" had "no present intention to enforce the law." With twenty or thirty such respondents it seems likely that at least one will not expressly disclaim such an intention, in which case perhaps the federal action could go forward.

(3) Justice Elena Kagan's dissent directed attention to what's come to be known as the Supreme Court's "shadow docket" – decisions rendered in cases seeking emergency relief, decided under extremely tight time lines and with quite limited briefings. The shadow docket has existed for decades, but it exploded under the Trump administration, which routinely sought the Supreme Court's immediate assistance when its initiatives were blocked by lower courts staffed by judges appointed by prior presidents. And the Court seemed systematically to go along: Statistics on the shadow docket show that the modern shadow docket decisions on matters of real importance favor conservative interests. The Biden Commission on Supreme Court reform has taken under advisement issues associated with the shadow docket, though it's quite difficult to figure out what, other than exhortation to be more careful and to act less precipitously, can be done about the docket.

(4) Finally, on the issue of "Court reform" (expansion, Court-packing): The SB8 order seems likely to feed into the narrative advocates for Court reform have developed – a Court "out of control," or "unbalanced," or "radically conservative and out of tune with the American people." The prospects for serious Court reform were never large, and the SB8 order probably won't make it likely in the short run. But, the narrative fueling proposals for Court reform has had surprising staying power, and Court reform might eventually take place. (For what it's worth: New Dealers were taking about the possibility of Court-packing as early as 1933, four years before FDR's Court-packing plan became the focus of heated political contention.)

ABOUT THE AUTHOR
Mark Tushnet
Mark Tushnet is William Nelson Cromwell Professor of Law emeritus at Harvard Law School.

SUGGESTED CITATION
Tushnet, Mark: Has the U.S. Supreme Court Effectively Overruled Roe v. Wade?, Verfassungsblog, 03.09.2021, .

Licensed under CC BY-SA 4.0.